MAINAH SURATMAN

v.

ROZINAH NIZARUDDIN, S GUNAPATI & CO; SAILAN & CO (INTENDED INTERVENER)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[PETITION OF COURSE NO: 17-28-1997]
30 SEPTEMBER 1998

CIVIL PROCEDURE: *Affidavits - Filing and service - Reply to affidavit - Reply filed and served outside time prescribed by Rules - Whether court could still receive affidavit-in-reply - Whether irregularity curable - Waiver - Objecting party nonetheless sought time to reply in case affidavit-in-reply received and did so reply - Whether non-compliance with Rules waived - What amounted to waiver - Rules of the High Court 1980, O. 32 r. 13(2)(b) & O. 41 r. 4*

CIVIL PROCEDURE: *Affidavits - Contents - Jurat - Jurat followed last averment of deposition on new page - Whether affidavit defective - Whether penultimate paragraph ought to have appeared on same page - Whether amounted to affidavit ending on one page with jurat following overleaf - Rules of the High Court 1980, Form 78*

The respondent in this case raised two preliminary objections. The first objection was against the filing of a particular enclosure ('the enclosure'). The enclosure was filed by way of a reply to an affidavit-in-reply ('the affidavit-in-reply') filed on behalf of the respondent. It was in evidence that the enclosure was served more than three months after the service of the affidavit-in-reply and therefore, on the authority of O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('the RHC'), it was stressed that the enclosure was filed and served out of time. The respondent argued that this delay had prejudiced them. Be that as it may, the parties left it to the court's discretion to decide whether to receive the affidavit. Further, the respondent orally sought time to reply to the enclosure in the event that the court did decide to receive it. In fact, notwithstanding the objection, the respondent did reply to the enclosure and both parties went on to file further affidavits.

The second preliminary objection raised by the respondent referred to the jurat in the affidavit. The jurat appeared immediately after para. 7, the last averment of the deposition. Paragraph 7, along with the jurat, was on a separate page. The respondent argued that para. 6 of the affidavit should be on the same page with para. 7 and such failure rendered the affidavit defective.

Held:

[1] Waiver is an abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of an avoidance.

[1a] The conduct of the respondent was totally inconsistent. In mounting an objection to the reception of the enclosure, the issue of prejudice was raised but in the same breath time to reply to the enclosure was sought and in fact the respondent did reply to the enclosure.

[1b] By seeking time to reply to the enclosure, the respondent had waived the non-compliance by the petitioner. The further steps taken by the respondent in filing affidavits clearly showed beyond peradventure that the respondent had waived the non-compliance with the Rules of the High Court by the petitioner.

[2] Paragraph 6 of the enclosure ran on the same page with para. 5 while para. 7 was on a separate page. The jurat was a spill over and it flowed immediately after para. 7, the last averment of the deposition. The enclosure could never be described to be an affidavit-in-reply that ended on one page with the jurat following overleaf. Thus, the jurat complied substantially with Form 78 of the RHC.

Per curiam:

Applying O. 41 r. 4 of the RHC 1980 to the enclosure, the irregularity, if at all it existed and it was absent here, could be cured without undue hardship. It was not a matter of great substance nor did it affect its actual contents and it could easily be put right.

[Preliminary objections dismissed with costs.]

Cases referred to:
AG v. Pontypridd Waterworks Co [1908] 1 Ch 388 ***(cit)***
Bennetts v. Mcllwraith [1896] 2 QB 464 ***(cit)***
Bondy v. Lloyd's Bank [1991] Times ***(refd)***
Byrne v. Brown [1889] 22 QBD 666 ***(cit)***
Chong Siew Choong v. Public Prosecutor [1996] 2 CLJ 823 ***(cit)***
Ideal Films Ltd v. Richards [1927] 1 KB 374 ***(cit)***
Jeffries v. Jeffries [1907] 51 SJ 572 ***(cit)***
Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850 ***(cit)***
Kendall v. Hamilton 4 App Cas 504 ***(cit)***
KS Chua & Co v. Chui Miang Chew & Ors [1996] 2 CLJ 676 ***(dist)***
McCheane v. Gyles (No 2) [1902] 1 Ch 911 ***(cit)***
Montgomery v. Foy [1895] 2 QB 321 ***(cit)***
Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391 ***(cit)***

Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1994] 2 MLJ 336 ***(aff)***
Norbury v. Griffiths [1918] 2 KB 369 ***(cit)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(dist)***
Performing Right Society v. London Theatre of Varieties [1924] AC 1 ***(cit)***
Pilley v. Robinson [1887] 20 QBD 155 ***(cit)***
Rein v. Stein [1892] 66 LT 469 ***(refd)***
Ross T Smyth & Co Ltd v. TD Bailey Son & Co [1940] 3 All ER 60 ***(refd)***
Stackhouse v. Barnston [1805] 10 Ves 453 ***(refd)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(dist)***
Taylor v. Roe [1893] 68 LT 213 ***(cit)***
Van Gelder v. Sowerby Bridge 44 Ch D 374 ***(cit)***
Voon Mow Chen v. Menteri Dalam Negeri & Anor [1993] 4 CLJ 195 ***(dist)***

Legislation referred to:
Court of Judicature Act 1964, s. 20
Rules of the High Court 1980, O. 15 r. 16(2)(b)(ii), O. 32 r. 13(2)(b), O. 41 r. 4, Form 78

For the applicant - Rosli Kamaruddin; M/s Teh Poh Teik & Co
For the respondent - RR Mahendran; M/s RR Mahendran & Co

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

All the parties agreed that the present petition should be heard first and the decision would bind forty other petitions of the same nature whose numbers ranged from Petition of Course No: 17-1-97 right up to Petition of Course No: 17-41-97. The chief judge of Malaya by letter dated 9 February 1998 as reflected in encl. 12 directed that I should handle all these petitions notwithstanding that the majority of them were filed before the other judges of the Johor Bahru High Court. I am bound by that directive by virtue of s. 20 of the Courts of Judicature Act 1964 (*Chong Siew Choong v. Public Prosecutor* CLJ JT (14) 1996; [1996] 2 CLJ 823, [1996] 5 MLJ 65) and speed was the order of the day. But alas, the parties were not ready and the matter dragged on and the delay was confounded by the applicant who filed the summons-in-chambers in encl. 17 to intervene under O. 15 r. 16(2)(b)(ii) of the Rules of the High Court 1980 ("RHC"). It was obvious that encl. 17 must be heard and disposed of at the first instance for the simple reason that the relevant parties must be before the court for determining the point at issue (*Kendall v. Hamilton* 4 App. Cas 504; *A.G. v. Pontypridd Waterworks Co.* [1908] 1 Ch. 388; *Norbury v. Griffiths* [1918] 2 KB 369 C.A.; and *Performing*

Right Society v. London Theatre of Varieties [1924] A.C. 1). Effectual adjudication is the concern of this court (*McCheane v. Gyles (No. 2)* [1902] 1 Ch 911; *Van Gelder v. Sowerby Bridge* 44 Ch. D 374; *Montgomery v. Foy* [1895] 2 QB 321; *Bennetts v. Mcllwraith* [1896] 2 QB 464 and these cases must be compared with *Pilley v. Robinson* [1887] 20 QBD 155; and *Ideal Films Ltd v. Richards* [1927] 1 KB 374). Put in another way the parties to the dispute in regard to the same subject matter must be before the court at the same time so that the disputes may be determined without undue delay, inconvenience and expense of separate actions and trials (*Byrne v. Brown* [1889] 22 QBD 666).

The main point in issue can be seen in encl. 3. I do not propose to examine the merits of encl. 3 at this stage. It would be too premature to do so. It would be sufficient to say that Mainah binti Suratman ("petitioner") obtained a consent order dated 18 May 1996 as a result of her land *vide* Lot 393, HS (M) 763 being acquired and the consent order related to an additional compensation of RM31,303.80. Messrs Rozinah Nizaruddin, S. Gunapati & Co ("respondent") acted as solicitors for the petitioner while the intended intervenor, namely, the applicant was the private valuer for the acquisition exercise. The petitioner's grievance was in regard to the failure of the respondent to submit the bill of costs to be taxed as the solicitors' fees levied by the respondent was said to be excessive and unreasonable. The solicitors' fees came up to RM8,703.03 sen. Enclosure 3 involved the professionalism of the respondent as solicitors for the petitioner and that of the applicant as the private valuer for the petitioner. The professionalism of these two personalities were at stake.

Be that as it may, the hearing of encl. 3 could not be proceeded with. It did not get off the ground at all. Priority was given to encl. 17. But unfortunately, the hearing of encl. 17 was stalled in view of the preliminary objections advanced by counsel for the respondent to the filing of encl. 28. Now, encl. 28 was an affidavit-in-reply of Sailan bin Haji Kasri that was affirmed on 29 July 1998 and filed on the same date. Sailan bin Haji Kasri is a registered valuer and property consultant, who holds a diploma in valuation from ITM, a Bachelor of Science in Land Administration from London and an M.I.S. from Malaya and practices his trade under the style of Sailan & Co. Enclosure 28 was filed by way of a reply to the affidavit-in-reply as seen in encl. 24 of Gunapati a/l Suppiah, an Advocate and Solicitor of the High Court of Malaya and a partner of the legal firm of Messrs Rozinah Nizaruddin, S. Gunapati & Co. Enclosure 24 was affirmed on 20 April 1998 and filed on the same date. The two preliminary objections in regard to the filing of encl. 28 were mainly procedural and the parties seemed to stress greatly and placed emphasis on the discretion of this court in regard to the reception of encl. 28. Of significance too was the issue of waiver that was raised.

It was argued that there was delay in the service of encl. 28. It was impressed upon me that encl. 24 was served on 20 April 1998 to the applicant and the 14 days period would expire on 4 May 1998 while encl. 28 was served on the respondent on 29 July 1998 and on the authority of O. 32 r. 13(2)(b) of the RHC there was a delay of 2 months 25 days. An argument was advanced that the delay had prejudiced the respondent. On perusal of encl. 28, one would easily discern that it was a short affidavit-in-reply comprising of a mere seven paragraphs. Perfectly short and harmless affidavit-in-reply at first glance. But the annexures thereto gave authority to Sailan & Co to appoint solicitors for those personalities whose lands have been acquired at the stipulated legal fees and a particular paragraph in those annexures worded in perfect Bahasa Malaysia should be reproduced:

> Kami bersetuju membayar perkhidmatan guaman dan penilaian berjumlah 6% (ENAM PERATUS) termasuk semua perbelanjaan dari jumlah tambahan yang boleh diperolehi.

Of late, O. 32 r. 13(2)(b) of the RHC has been a source of a rich legal argument. On 1 June 1995, in *K.S. Chua & Co v. Chui Miang Chew & Ors* [1995] 4 MLJ 436, I had occasion to say something of that order particularly at pp. 441 to 443 thereof in these words:

> Miss Teoh Saw Luan, the learned counsel for the defendants, raised preliminary objections and she argued on these lines. That enclosures 45 and 48 were served on the defendants' solicitors on 3 and 5 October 1994 respectively and these enclosures responded to the defendants' enclosure 40 which was in support of enclosure 41. Since enclosure 40 was filed and served on the plaintiffs' solicitors on 15 August 1994 (see exhibit marked 'CMC 1' of enclosure 50), enclosures 45 and 48 should be filed and served by the latest on 28 August 1994 on the defendants' solicitors. Put in another way, she argued that Chua Kon Sing's affidavits in enclosures 45 and 48 were filed and served out of time and that would run counter to Order 32, rule 13(2)(b) of the RHC as these two affidavits were meant to reply to Chui Miang Chew's affidavit that was affirmed on 11 August 1994 as *per* enclosure 40 which was in support of the application for dismissal of the plaintiffs' claim in enclosure 41. Order 32, rule 13(2)(b) of the RHC reads as follows:
>
> > Save as otherwise provided in these rules -
> >
> > (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.
>
> The delays for enclosures 45 and 48 were one month 18 days and one month 20 days respectively.

In regard to Reginald Vallipuram's affidavits in enclosures 43 and 44 in response to the defendants' affidavit in enclosure 40, it was argued that they were served on the defendants on 3 October 1994 (for enclosure 43) and on 5 October 1994 (for enclosure 44) whereas enclosure 40 was filed and served on the plaintiffs' solicitors on 15 August 1994 (see the affidavit evidence in enclosure 51 which sets out these details). The delays for enclosures 43 and 44 were of the same time frames as enclosures 45 and 48.

In so far as enclosure 40 was concerned, time begins to run from 15 August 1994 and this was agreed upon by Reginald Vallipuram in his submission before me but he prayed orally in aid of Order 3, rule 5(1) of the RHC to extend or abridge the time period. In so doing he applied for an adjournment to enable him to apply formally to enlarge time. In rebuttal, Miss Teoh Saw Luan argued against the adjournment. She submitted that it was unfair to the defendants if an adjournment was granted as the entire fault was not hers but that of Reginald Vallipuram. She pointed out that it was incorrect to say that the preliminary objections were raised without due notice to the plaintiffs as these were sufficiently referred to in enclosure 50 at para 6 onwards. It is now trite that the court will always exercise a discretion to extend time. That discretion, however, must be exercised with a view to the avoidance of injustice to the other parties (*Schafer v. Blyth* [1920] 2 KB 143). It was held in *Revici v. Prentice Hall Inc* [1969] 1 WLR 157; [1969] 1 ALL ER 772 (C.A), that the rules as to time be observed, and if substantial delay occurs without any explanation being offered, the court is entitled not to extend time. Here there was substantial delay and the reason for that delay was explained in enclosures 43 and 44 which, as Miss Teoh Saw Luan rightly pointed out, relate to the ill-health of Reginald Vallipuram as the counsel for the plaintiffs. It is my judgment that the solicitor's ill-health for three to four years at a stretch which prevented him from attending to his files was rather unfortunate and cannot be an acceptable reason for an enlargement of time under Order 3, rule 5 (1) of the RHC, even if there is a formal application for abridging time. It is quite obvious that to do justice to his client, Reginald Vallipuram should have referred his client's case to another solicitor who is able and willing to handle the case expeditiously and within the framework of the RHC. To go a step further, Reginald Vallipuram's mistake in not referring his client's case to another solicitor in town when he was taken ill must be construed against him and can no longer be the basis for an enlargement of time (see generally for comparison the cases of *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129; and *Sinnathamby & Anor v. Lee Chooi Ying* [1987] 1 MLJ 110 (S.C) as cited in *Scott & English (M) Sdn Bhd v. Lei Kie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424). On obedience to the Rules of Court, I need only cite the case of *Ratnam v. Cumarasamy & Anor* [1965] MLJ 228 (P.C), where Lord Guest in an illuminating judgment had this to say:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court

can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

That sums up the position of the plaintiffs in so far as Order 3, rule 5(1) of the RHC is concerned. Now, reverting back to Order 32, rule 13(2)(b) of the RHC which came by way of an amendment *vide* PU(A) 193/93 where it imposes on a party wishing to reply to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see Order 32, rule 13(2)(a) of the RHC). Thus, under this new Order 32, rule 13(2) of the RHC a strict time-table has been set by the Rules Committee and my impression of it is that it is draconian as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application. In the event the respondent files an affidavit in reply which alleges a certain fact detrimental to the applicant, the applicant must reply otherwise those facts not replied will be deemed to be accepted by the applicant (*Alloy Automobile Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287) and this must surely be the dilemma which the applicant must go through. The strict requirement under this rule will simply mean that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14 days period unless applications to file those affidavits out of time formally have been made and granted by the courts. In my judgment, the plaintiffs here have breached the strict requirements of Order 32, rule 13 (2)(b) of the RHC. Bereft of any formal application to file those affidavits in enclosures 45, 48, 43 and 44 out of time, I have no choice but to ignore those affidavits. For the aforesaid reasons, I acceded to the defendants' preliminary objections.

There was no formal application to file those affidavits out of time in *K.S. Chua & Co v. Chui Miang Chew & Ors [supra]* and the plaintiffs there were penalised under O. 32 r. 13(2)(b) of the RHC. Incidentally, *K.S. Chua* was

also reported in two other popular local journals *vide* [1995] 3 AMR:2605 and [1996] 2 CLJ 676.

On 15 May 1996, the Court of Appeal (Shaik Daud, N.H. Chan and Mahadev Shankar JJCA) in *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 said through Mahadev Shankar JCA at p. 586 of the report:

> However, we would like to add that the critical words in Order 32 rule 13(2) - for the purposes of computation of time - are 'within 14 days from the date of the filing of the application' and in Order 32 rule 13 (2)(b) within 14 days from the date of service.
>
> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with the part of the judgment of the learned judge in the court below and in the case of *Pua Lai Ong* [1995] 3 MLJ 175 earlier referred to. The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the registry. By the time that event took place it was envisaged that the affidavit in support of the application would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard.
>
> It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived. If an objection is taken, the court will have to take the necessary steps under Order 2. This will call for an exercise of discretion which should be appropriately exercised in the circumstances. *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 3 MLJ 715 is an instance where after objection was taken, the court rejected an affidavit in reply which had been filed after a delay of 2½ months.
>
> Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.
>
> In the particular matter before us, we regret that the defendants' solicitors thought fit to carry their objection as far as they have done. By so doing, they may have gained their clients' time. It is very doubtful if they have served the ends of justice.

On 11 July 1996, again the Court of Appeal with a different coram (Siti Norma Yaakob, Abdul Malek Ahmad and Mokhtar Sidin JJCA) in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 MLJ 85 had occasion

to give judicial pronouncements in regard to O. 32 r. 13(2)(b) of the RHC through Siti Norma Yaakob JCA in these words (at p. 90 of the report):

> Every application in chambers must normally begin by way of summons supported by an affidavit affirmed by the party making the application. Both the summons and affidavit must be filed and served on the other party as required by Order 32 rules (1) and (2) read together with rule 13(1)(a) of the same order. The right to reply by affidavit is then opened to the other party but this right must be exercised within the 14-day period stipulated by sub-rule (2)(b) of Order 32 rule 13. The issue raised before us is, when does time start to run ? On the facts of this case, is it from the first time the respondent received the appellant's affidavit in support together with the unsealed copy of the summons on 3 March 1995, as the appellant contended, or from the time the same affidavit was served on the respondent the second time together with the sealed copy of the summons on 12 April 1995, as contended by the respondent ?

Her Ladyship continued at p. 93 of the report in a serious vein:

> Order 32 rule 13(2)(b) makes it mandatory for such an affidavit in reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion. To state otherwise would defeat the very purpose Order 32 rule 13(2) was intended i.e. to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers. For that reason, we cannot support the finding reached by *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 3 MLJ 715, on the existence of a discretion. We hasten to add that under such circumstances, the defendant may apply for an abridgement of the period required to file the affidavit in reply pursuant to Order 3 rule 5(1) of the RHC.

I am bound by the decisions of the Court of Appeal. But I venture to say that in the present petition there was a difference in the approach adopted by the parties. Here, the parties left the matter to my discretion as to whether encl. 28 ought to be received in evidence and in the event the answer was in the positive, time be given to the respondent to file a reply. The magnanimous gesture of the parties put the present petition miles apart from the two Court of Appeal cases and even the case of *K.S. Chua*. The discretion of the court when faced with a non-compliance has been ventilated in the case of *Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1994] 2 MLJ 336. There I said at pp. 341 to 342 of the report:

It is basic and fundamental that in the course of litigation, rules of procedure must be observed. But the courts have from time to time been aware of the danger that too rigid an adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. For instance, Order 2 rule 1 of the RHC says that non-compliance with a rule of procedure at whatever stage of the proceedings 'whether in respect of time, place, manner, form or content or in any other respect' is to be treated as an irregularity. It does not automatically 'nullify the proceedings, any step taken in those proceedings, or any document, judgment or order therein'. But the court is nevertheless empowered to set aside 'wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein' or to allow an amendment or 'to make such order ... generally as it thinks fit'. Incidentally, the court may also make an ancillary order as to costs or other terms as may be just. In short, Order 2 rule 1 of the RHC strictly concerns the discretion exercisable by the court when it is faced with non-compliance.

I am of the considered view that no irregularity or defect, whatever its nature, automatically renders the proceeding a nullity. The court is still empowered to consider each case on its merits and make whatever decision it deems just. I am fortified in my view by a passage appearing in the judgment of Cumming-Bruce L.J. in *Metroinvest Ansalt v. Commercial Union Assurance Co Ltd* [1985] 1 WLR 513; [1985] 2 ALL ER 318 to the following effect [at page 521F-G]:

> I would say that in most cases the way in which the court exercises its powers under Order 2, rule 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Order 2 rule 1(2) as being so framed as to give the court the widest possible power in order to do justice.

In *Leal v. Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874; [1984] 2 ALL ER 207, Stephenson L.J. stated that the seriousness of the irregularity could be a basis for not exercising the discretion to cure it, whether real prejudice was caused or not. His Lordship succinctly said, 'The court's restraining hand is an important restriction on the misuse of ... procedure.'

Ng Chai Yang too was reported in another local journal, namely: [1994] 2 AMR 23:1182.

Counsel for the respondent orally sought time to reply to encl. 28 and this, in my judgment, amounts to a waiver. It was not disputed that the respondent was in receipt of encl. 28 and by accepting an adjournment to answer them the respondent has waived the non-compliance by the applicant. A study of the following cases:

(1) *Taylor v. Roe* [1893] 68 LT 213; and

(2) *Jeffries v. Jeffries* [1907] 51 S.J. 572

would give an insight as to the situation where one party accepts an adjournment in order to answer the affidavit filed by the opposing party and that such an acceptance would amount to a waiver of the irregularity. To confound the matter further, I was informed that Gunapati a/l Suppiah has affirmed an affidavit-in-reply on 12 August 1998 to reply to encl. 28. Not only that, I too was informed that Sailan bin Haji Kasri has responded by filing an affidavit-in-reply which was affirmed on 25 August 1998. On perusing through the court file, I have discovered that both the respondent and the applicant have filed further affidavits. Gunapati a/l Suppiah affirmed an affidavit on 8 September 1998 and which affidavit was filed on the same date. Sailan bin Haji Kasri also affirmed an affidavit-in-reply on 21 September 1998 and on the next day it was filed in court. In my judgment, the further steps taken by the respondent in filing those affidavits clearly showed beyond peradventure that the respondent has waived the non-compliance with the RHC that was initially flouted by the applicant. Cave J in *Rein v. Stein* [1892] 66 L.T. 469 once remarked that:

> In order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained.

It is a correct proposition of law to say that the expression "waiver" is capable of different meanings. This seems to be the views of two Law Lords:

(1) Lord Diplock in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882, 883; [1970] 2 All ER 871 at 894; and

(2) Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 397.

Lord Wright in *Ross T Smyth & Co Ltd v. TD Bailey Son & Co* [1940] 3 All ER 60 at 70 described the word "waiver" as a vague term used in many senses. Waiver is an abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of an avoidance. As Grant MR aptly puts it in *Stackhouse v. Barnston* [1805] 10 Ves 453 at 466; ER 32 Ch 921 at 925 and 926:

> A waiver is nothing; unless it amounts to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist

upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea.

The conduct of counsel for the respondent was totally inconsistent. In mounting an objection to the reception of encl. 28, he raised the issue of prejudice but in the same breath he sought time to reply to encl. 28 and in fact did reply to that enclosure. Waiver was clearly exhibited for this court to appreciate and apply vigorously in favour of the applicant. This was done. On prejudice, I need to refer to the case of *Bondy v. Lloyd's Bank*, an unreported decision of the English Court of Appeal which appeared in the Times, 13 March 1991 issue, where the court there considered the prejudice which might be suffered by the defaulting party if his error was merely technical in nature. That technical error was the failure of the plaintiff to append an acknowledgment of service to the writ for the purpose of service. Woolf J rightly noted that since the service was effected on experienced solicitors, there was no prejudice at all. Likewise here, encl. 28 was served on the respondent - an advocate and solicitor, and there would certainly be no prejudice at all.

The second preliminary objection was in regard to the jurat in encl. 28. It was argued that para. 6 of encl. 28 should be on the same page with para. 7 of encl. 28 and such failure rendered the affidavit-in-reply in encl. 28 to be defective. This argument was without merit. It must be stressed that para. 6 of encl. 28 runs on the same page with para. 5. Paragraph 7 of encl. 28 is on a separate page and this is the crucial part. I venture to say that the jurat is a spill over and it flows immediately after para. 7, the last averment of the deposition. This is the clear difference and a crucial one from that of *Voon Mow Chen v. Menteri Dalam Negeri & Anor* [1993] 4 CLJ 495; [1993] 2 AMR 38: 2199. The jurat in encl. 28 follows immediately after para. 7 and a reproduction is necessary:

7. Dengan demikian saya memohon Mahkamah yang mulia ini memberi Perintah seperti yang dipohon.

Diikrar oleh SAILAN]
BIN HAJI KASRI pada]
29 haribulan Julai,] Signed (Illegible)
1998 di Johor Bahru,] .....
Johor.]

Dihadapan saya.
Signed (Illegible)
.....
Pesuruhjaya Sumpah,
No: J-052,
Chin Poh John,
No: 27, Jalan Dhoby,
80000 Johor Bahru.

Affidavit Balasan kepada Affidavit Jawapan ini difailkan oleh Tetuan Teh Poh Teik & Co yang beralamat di Bilik 3, Tingkat 20, Kompleks Tun Abdul Razak, Jalan Wong Ah Fook, 80000 Johor Bahru, Johor (Ruj.kami: TPT/RK/MC/S70-98/L).

Enclosure 28 can never be described to be an affidavit-in-reply that ends on one page with the jurat following overleaf. The jurat follows immediately after the end of para. 7. Even if the affidavit-in-reply in encl. 28 is said to be defective, it may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereto. This is clearly set out in O. 41 r. 4 of the RHC and that order is the answer to the applicant's woe and it is clearly worded or couched in permissive language. In my judgment, applying O. 41 r. 4 of the RHC in its full rigour to the present petition especially to encl. 28, the irregularity, if at all it exists and it is absent here, can be cured without undue hardship. It is not a matter of great substance nor does it affect its actual contents and it could easily be put right. I ruled that the jurat complies substantially with Form 78 of the RHC. As the deponent is a Malay gentleman and he understands the Malay language (Bahasa Malaysia) and the affidavit-in-reply in encl. 28 was in the Malay language (Bahasa Malaysia), there was no necessity for an interpretation. There was also a waiver for this preliminary objection and it should be construed in favour of the applicant. This was my judgment and I so hold accordingly.

For these reasons, the preliminary objections in regard to encl. 28 were dismissed with costs. The respondent was given time to reply to encl. 28 and no time frame was prescribed.